Timbunan Alam Development Sdn Bhd v Platicorp Holding (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D6–28–753 OF 1999
REKHRAJ J
24 JANUARY 2000

Companies and Corporations — *Winding-up — Petition signed by petitioner's solicitors was served on respondent — Whether petitioner required to serve affidavit in verification of petition — Whether petitioner must personally sign petition — Whether bankruptcy rules applicable — Companies (Winding-up) Rules 1972 rr 22 & 26*

The petitioners filed a winding-up petition in court against the respondent on 3 September 1999. At the hearing of the petition, the respondent solicitors raised two preliminary objections: (i) that the affidavit in verification in support of the petition was not served on the respondent; and (ii) that the petition was not signed by the petitioner themselves but instead was signed by the solicitors of the petitioners and the respondent solicitors rested his argument based on the requirements of forms adopted under the Bankruptcy Act 1967 and particularly Form 9 of r 9 of the Bankruptcy Rules 1969 which requires the petitioning creditor to sign the creditors petition.

Held, dismissing the preliminary objections:

(1) Neither the Companies Act 1965 nor the Companies (Winding-up) Rules 1972 procedurally require the affidavit in verification of the petition to be served on the respondent. All that is required is that a petition is to be served. A petition proper comes into existence immediately upon the filing of the petition into court whereas the affidavit in verification is procedurally required to verify the petition within four days thereafter of the filing of the petition. The petition per se stands independently of the affidavit in verification and the affidavit cannot therefore be said to form a part of the petition (see p 639B–D).

(2) The Bankruptcy Act 1967 and the Rules thereunder are not applicable in pari materia to the winding-up proceedings which are specifically governed by the Companies Act 1965 and the Companies (Winding-up) Rules 1972 (see p 639H); *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd* [1996] 2 MLJ 482 followed. Further r 22 of the Companies (Winding-up) Rules 1972 requires the winding-up petition to be in Form 2 or 3 with such modification or variation as circumstances may require. It does not spell out or require the petitioning creditor to personally sign the petition. A corporation can only be represented in court by its agent, who must be an authorized person to act on the instructions of the company, and in that capacity to bring or defend the actions provided when bringing such actions, clear identity of his capacity is

A disclosed in bringing the action for and on behalf of the company (see p 639H–640C).

(3) The non-signing by the petitioner of the petition personally, does not and has not in any way shown to have caused any prejudice, or substantial injustice to the respondent and it was only an irregularity which is curable under s 194(1) of the Companies (Winding-up) Rules 1972 (see p 640E–F).

B

[Bahasa Malaysia summary

Pempetisyen telah memfailkan petisyen penggulungan di mahkamah terhadap responden pada 3 September 1999. Semasa pendengaran petisyen tersebut, peguam responden membangkitkan dua bantahan awal: (i) bahawa afidavit menentu sah yang menyokong petisyen tersebut tidak diserahkan kepada responden; dan (ii) bahawa petisyen tersebut tidak ditandatangani oleh pempetisyen sendiri tetapi telah ditandatangani oleh peguam pempetisyen dan peguam responden telah mendasarkan hujahannya di atas keperluan borang yang terpakai di bawah Akta Kebankrapan 1967 terutamanya Borang 9 k 9 Kaedah-Kaedah Kebankrapan 1969 yang memerlukan pemiutang yang memohon petisyen untuk menandatangani petisyen pemiutang.

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Diputuskan, menolak bantahan-bantahan awal:

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(1) Kedua-dua Akta Syarikat 1965 dan Kaedah-Kaedah (Penggulungan) Syarikat 1972 tidak secara prosedur memerlukan affidavit menentusahkan petisyen diserahkan kepada responden. Apa yang diperlukan adalah bahawa petisyen diserahkan. Suatu petisyen yang sebenar akan wujud sejurus selepas pemfailan petisyen di mahkamah sementara affidavit menentu sah adalah diperlukan secara prosedur untuk menentusahkan petisyen di dalam masa empat hari selepas memfailkan petisyen tersebut. Petisyen itu sendiri dapat bertahan tanpa affidavit menentusahkan affidavit dan affidavit tersebut tidak boleh membentuk sebahagian daripada petisyen tersebut (lihat ms 639B–D).

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(2) Akta Kebankrapan 1967 dan Kaedah-kaedah di bawahnya tidak terpakai pari materia kepada prosiding penggulungan yang diliputi secara spesifik oleh Akta Syarikat 1965 dan Kaedah-Kaedah Penggulungan 1972 (lihat ms 639H); *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd* [1996] 2 MLJ 482 diikut. Selanjutnya k 22 Kaedah-Kaedah Penggulungan 1972 memerlukan petisyen penggulungan di dalam bentuk Borang 2 atau 3 dengan pengubahsuaian atau perubahan seperti yang diperlukan oleh keadaan semasa. Ia tidak menyatakan atau memerlukan pemiutang yang mempetisyen untuk menandatangani sendiri petisyen tersebut. Suatu perbadanan hanya boleh diwakili di mahkamah oleh wakil yang mesti pihak yang diberi kuasa untuk bertindak di atas arahan-arahan syarikat,

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dan di dalam kapisiti tersebut untuk membawa atau mempertahankan tindakan-tindakan dengan syarat semasa membawa tindakan-tindakan tersebut, identiti jelas mengenai kapisitinya didedahkan semasa membawa tindakan tersebut untuk dan bagi pihak syarikat tersebut (lihat ms 639H–640C). A

(3) Ketiadaan tandatangan oleh pempetisyen di atas petisyen secara peribadi, tidak dan dan tidak dengan apa cara sekali pun menyebabkan sebarang prejudis, ketidakadilan yang besar kepada responden dan ia hanyalah salah aturan yang boleh dipulihkan di bawah k 194(1) Kaedah-Kaedah Penggulungan 1972 (lihat ms 640E–F).] B

[*Editorial note*: The respondent has appealed to the Court of Appeal vide Appeal No W–02–36–2000] C

Notes

For cases on winding-up petition, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) at paras 809–840. D

Cases referred to

YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd [1996] 2 MLJ 482 (folld)

E

Legislation referred to

Bankruptcy Act 1967
Bankruptcy Rules 1969 r 9 Form 9
Companies Act 1965 s 194(1)
Companies (Winding-up) Rules 1972 rr 22, 26, 194 (1)

F

S Thilaga (*FY Poh & Co*) for the petitioner.
Simon Hue (*Ho Loke & Koh*) for the respondent.

Rekhraj J: The petitioners filed a petition in court against the respondent on 3 September 1999, averring that the respondent company was indebted to the petitioner in the sum of RM1,430,000 (excluding interest) worked up as at 21 May 1998; being the balance of the purchase price payable over the property held under H S (M) 32832 PT No 32672 Mukim of Ampang with a four-and-a-half storey shophouse erected thereon and better known as Lot 14, Jalan Perdana 10/12 Pusat Perdagangan Tasik Perdana, 55300 Kuala Lumpur. G

The petition was signed by FY Poh & Co as solicitors for the petitioners. At the hearing of the Petition the respondent solicitors took two preliminary objections: H

(i) that the affidavit in verification in support of the petition was not served on the respondent;

(ii) that the petition was not signed by the petitioner themselves — as a limited company, but instead was signed by the solicitors of the petitioners; and this amounted to a material defect, not curable by the I

court under its inherent discretionary powers; and as such it should be struck off.

Upon hearing the arguments, I dismissed both the preliminary objections and my reasons for dismissing are:

(i) that neither the Companies Act 1965; nor the Companies (Winding-up) Rules 1972, procedurally require the affidavit in verification of the petition, to be served on the respondent. All that is required is that *a petition is to be served*; under r 26 — which reads:

> Every petition for the winding-up of a company... shall be verified by an affidavit ... and and in the case (where) the petition is presented by a corporation (then the said affidavit) shall be affirmed by some director, secretary or other principal officer; and sworn and filed within four days *after the petition is presented.*

Further by r 25(1): 'Every petition shall be served upon the company'; so the question for the court was *whether the petition includes the affidavit in verification*, and the court held that a petition proper comes into existence immediately upon the filing of the petition into court; whereas the affidavit in verification is procedurally required to verify the petition within four days thereafter of the filing of the petition. In the light thereof, the petition perse stands independently of the affidavit in verification; and the affidavit cannot therefore be said to form a part of the petition.

In any event, from the affidavit of service of the petition, affirmed by Mr Allfeat M Ignally on 16 October 1999, he deposed, that he had personally called at the registered office on 22 September 1999 at 11.45am and thereat served upon a person identified as Catherine Chong, a servant of the company, who accepted service of both the petition and the affidavit in verification of the petition; but *refused* to acknowledge receipt thereof, by affixing the respondent's rubber stamp. With this averment on record, without any denial or rebuttal by a counter-affidavit, I am satisfied that notwithstanding my holding otherwise on the question of service on the affidavit in verification; it was so served and the question of service as such does not arise.

On the second preliminary point, the respondent solicitors rested his argument based on the requirements of forms adopted under the Bankruptcy Act 1967 and the Rules thereunder — more particularly Form 9 (Bankruptcy Rule r 9) which requires the petitioning creditor to sign the creditors petition and the signing thereof to be attested by a solicitor.

I must from the outset state that the Bankruptcy Act 1967 and the Rules thereunder are not applicable pari materia to the winding-up proceedings; which are specifically governed by the Companies Act 1965 and the Companies (Winding-up) Rules 1972. This has been decided by the Court of Appeal in the case of *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd* [1996] 2 MLJ 482 at p 489 where the court held 'that the authorities from the bankruptcy cases are not applicable to winding-up proceedings'.

Further r 22 of the Companies (Winding-up) Rules 1972 requires the winding-up petition to be in Form 2 or 3 with such modification or variation as circumstances may require. It does not spell out or require the petitioning creditor to personally sign the petition; as in the case of the creditor's petition under Form 9 of the Bankruptcy Act. The preamble and the statements to the petition in Form 2 under the Companies Act concludes with words 'Your Petitioner therefore humbly prays as follows — that the said company be wound up.'; without any reference or guidance as to who signs the petition!

It is a trite law, that a corporation can only be represented in court by its *agent*; who must be an authorized person to act on the instructions of the company; and in that capacity to bring or defend the actions; provided when bringing such actions, clear identity of his capacity is disclosed in bringing the action for and on behalf of the company; and which the solicitors M/s F Y Poh & Co have correctly done by signing the petition as such on behalf of the company.

In support of this argument, I refer to s 194 of the Companies Act 1965 — on the Interpretation of the word 'officer or agent' in relation to corporation, includes an *advocate*; and with it, because of the fused system of the legal profession in our country, to mean a 'solicitor' as being the person appointed by the corporation to do all such acts or things for and on behalf of the company.

The call of the respondents solicitors on the format to be signed by the petitioner is a call in futility; as the non-signing by the petitioner of the petition personally, does not and has not in any way shown to have caused any prejudice, or substantial injustice to the respondent; and the court upon being so satisfied, held that such non-signing was only an irregularity, curable under r 194(1) of the Companies (Winding-Up) Rules 1972 which states:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity; and that the injustice cannot be remedied by any order of the court.

I am satisfied that the petition as presented is properly signed by its authorised agent of the company, under the hand of its solicitors acting for and on behalf of the company, and their signing as such has not caused any injustice or prejudice to the respondent.

The respondent has appealed to the Court of Appeal on these points, and in the interim period, pending the appeal, by consent of the parties a provisional liquidator has been appointed over the affairs of the respondent company.

Preliminary objections dismissed.

Reported by Benjamin Yong

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